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# In the Supreme Court

OF THE  
United States

OCTOBER TERM, 1949

No. 47

COLGATE-PALMOLIVE-PEET COMPANY,

*Petitioner,*

vs.

THE NATIONAL LABOR RELATIONS BOARD,  
et al.,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The opinion of the Court of Appeals, for the Ninth Circuit (R. IV, 990-992) is reported in 171 F.(2d) 956. The findings, conclusions and order of the National Labor Relations Board (R. I, 68-85) are reported in 70 N.L.R.B. 1202.

### **JURISDICTION.**

The decree of the Court of Appeals was entered on January 13, 1949. (R. IV, 993-996.) A petition for rehearing was denied on February 4, 1949. (R. IV, 997.) The petition for writ of certiorari was filed on April 4, 1949, and was granted on May 31, 1949. (R. IV, 999.) The jurisdiction of this Court rests on Section 240 (a), Judicial Code, as amended, 28 U.S.C.A. 1254 (1), and Section 10 (e) and (f) of the National Labor Relations Act of 1935, 29 U.S.C.A. 160 (e) and (f), as amended by the Labor Management Relations Act, 1947.

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### **STATUTES INVOLVED.**

Under the terms of the order granting certiorari (R. IV, 999), the statute involved is the National Labor Relations Act of 1935, 29 U.S.C.A. 151, et seq., especially 29 U.S.C.A. 158 (3). The pertinent sections of this statute are set forth in the Appendix.

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### **STATEMENT OF THE CASE.**

This case arose out of a complaint issued by the Board charging the petitioner with unfair labor practices (R. I, 4-10), and involves the discharge by petitioner of thirty-seven of its employees as a result of demands therefor made, under the terms of a valid closed shop contract (R. I, 69; R. III, 787-788), by Warehouse Union Local 6, International Longshore-

men's & Warehousemen's Union (CIO), hereafter referred to as the "CIO". (R. I, 178-179; R. II, 521-525; R. III, 784-785; R. II, 527-528; 545; R. III, 846-847; R. I, 46; R. III, 806-807; R. II, 654-656; R. III, 733-734; 736; R. I, 50 and Note 20; R. III, 806; R. II, 654-656.) The CIO was the bargaining representative of petitioner's employees. With the exception of two, all of these employees had been members of the CIO. (R. II, 641; 650.) All but six<sup>1</sup> of the employees had, prior to their discharge, resigned, in mass, from the CIO (R. I, 70; 257; R. III, 786-787), and all of them without exception had participated in a strike not authorized by the CIO. (R. I, 71-72; 257-258; R. II, 506-507.) At the time these events occurred, the war with Japan was still in progress, and the CIO had given a pledge not to engage in strikes during this period. (R. II, 420-421; R. I, 258; R. II, 506-507.) At the time that the employees resigned from the CIO and engaged in the strike, they were advocating a change of bargaining representatives and had formed the Colgate-Palmolive-Peet Company Employees' Welfare Association, hereinafter called the "Association", and were looking forward to affiliating with the International Chemical Workers Union, A.F.I., hereinafter referred to as "A.F.I." (R. I, 256-258; R. II, 506-507.)

In considering the evidence hereinafter summarized, it should be borne in mind that the Record of this proceeding discloses no history of hostility on the

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<sup>1</sup>Including the two who were not members of the CIO.

part of the petitioner to the organization of its employees and that there is not involved in this case, as there was in *Wallace Corporation v. National Labor Relations Board*, 323 U.S. 251, 89 L.Ed. 216, any question of domination by the employer of a labor organization or of any agreement between the employer and a group of employees to deprive other employees of the rights guaranteed to them by Section 7 of the National Labor Relations Act of 1935. (29 U.S.C.A. 7.)

The facts which form the background of this controversy may be summarized as follows:

Petitioner's employees were first organized in 1936. At that time and for approximately two years thereafter, the I.L.A., affiliated with the American Federation of Labor, was the bargaining agent for the employees. Subsequently, on or about 1938, the employees shifted their allegiance from the I.L.A. to the CIO. The CIO is now, and has been since 1938, the bargaining agent for petitioner's employees in the proper bargaining unit. (R. I, 286; R. II, 625; R. I, 23.) On or about July 9, 1941, the CIO entered into a collective bargaining agreement with petitioner. (R. III, 787.) This contract is of indefinite duration. Section 3 thereof provides as follows:

"Section 3. The Employer agrees that when new employees are to be hired to do any work covered by Section One (1), they shall be hired through the offices of the Union, provided that the Union shall be able to furnish competent workers for work required. In the event the union

is unable to furnish competent workers, the Employer may hire from outside sources, provided that employees so hired shall make application for membership in the Union within fifteen (15) days of their employment. *The employees covered by this agreement shall be members in good standing of the Union and the Employer shall employ no workers other than members of the Union subject to conditions herein above prescribed.* In the hiring of new help (for the warehouses), they shall be hired through the offices of the Warehouse Union, Local 1-6, I.L.W.U." (Italics ours.) (R. III, 787-788; R. I, 222-223.)

The contract was amended and extended on July 24, 1945, subject to the approval of the War Labor Board. (R. III, 788-790; R. I, 69.)

The Board admits and found that this contract was made in compliance with the conditions set forth in the proviso to Section 8.(3) of the National Labor Relations Act of 1935 (29 U.S.C.A. Section 158 (3)), which permitted an employer to make a closed shop contract with a bona fide majority Union covering an appropriate unit. (R. I, 69.)

The events out of which case arose occurred between July 26, 1945 and December 17, 1945. Petitioner was, during this period, manufacturing at its plant in Berkeley, California, glycerine for war purposes and was producing it at the rate of between four and five hundred thousand pounds per month. (R. II, 559.) The petitioner then employed approximately 313 non-supervisory employees. (R. II, 422.) There was then

in effect a pledge by the CIO to the President and the Nation "that until the war is ended, with the unconditional surrender of Japan, we will not strike, stop work or cease or slow production for any reason whatsoever". (R. II, 420-421.) Then, as now, the CIO was strongly opposed to racial discrimination.

The management of petitioner had known for some time prior to July 26, 1945, that five of the employees subsequently discharged, who were CIO shop stewards at petitioner's plant, had been accused of working against the established policies of the CIO, including the CIO's policy against racial discrimination. Information had also come to petitioner's management of the fact that the stewards had been accused of being remiss in carrying out their duties of office in other particulars. (R. III, 725-726; 763-768.)

The events which occurred on and subsequent to July 26, 1945 may be summarized as follows:

1. On July 26, 1945, twenty-eight to thirty employees, including the five stewards mentioned above, held a meeting to formulate plans to withdraw from the CIO, form the Association and to affiliate with a Local of a strong International. It was stipulated that petitioner had no knowledge that this meeting was being held. (R. I, 189-190; 260-261; 286-287; R. II, 408-409; R. I, 255.)

2. On July 28, 1945, one of the stewards, pursuant to plans made at the above mentioned meeting, posted notices at the plant of a meeting to be held on July 30, 1945, for all those interested in joining the Asso-

ciation. The notices did not disclose the purpose of the meeting. The notices were called to the attention of petitioner's Labor Relations Manager, but he did not associate the organization mentioned therein with one intended for collective bargaining purposes. (R. I, 191-192; 213; R. III, 668; 721-722.)

3. Prior to the holding of the announced meeting, one of the stewards, accompanied by one of the subsequently discharged employees, solicited and obtained from petitioner's management a "lay-off" of two hours to enable the night shift employees to attend the meeting. There is no evidence that anyone informed petitioner's representatives of the purpose of the meeting. (R. I, 268-269.)

4. On July 30, 1945, a few hours prior to the time announced for the meeting, five officers of the CIO called upon petitioner's management representatives and delivered to them a letter, advising that charges had been preferred against the five stewards by the Union and that the men had been suspended from membership. The letter also contained a request that the stewards be immediately removed from the job until the charges had been determined by the CIO. (R. III, 668-669; 784-785; R. I, 259.) Petitioner's representatives protested the request, but the CIO officers called to their attention the fact that under the terms of the agreement they had no alternative but to comply with the demand. The stewards were summoned, while the CIO officers were still present, and advised of their dismissal. At that time peti-

tioner's representatives received ~~no~~ information as to the reason underlying the CIO's demand. (R. III, 669-670; R. II, 523-525; 538-539.) Immediately following the dismissal of the stewards, the CIO's representatives distributed in the plant a notice advising that anyone attending the meeting would do so at the "risk of losing membership and employment". (R. I, 256; R. II, 473; R. III, 785; R. I, 259.) There is no evidence that petitioner received information as to the contents of this notice.

5. Late in the afternoon of July 30, 1945, a substantial majority of petitioner's employees attended the meeting. (R. I, 256-257.) At that time, those present authorized the sending of telegrams to petitioner and the CIO, advising that they had withdrawn from and severed relations with the CIO (R. I, 198-201; R. III, 786-787; 848-850; R. I, 259), and appointed a committee of four to negotiate with petitioner's management for the reinstatement of the five stewards. (R. I, 198; R. III, 848-849.) It was also resolved at that time to go on strike in the event the demand for the reinstatement of the stewards was refused. (R. III, 849.)

6. On July 31, 1945, the four committeemen called on petitioner's representatives and requested the reinstatement of the stewards. This request was refused. (R. I, 257.) Shortly thereafter, officers of the CIO called upon petitioner's representatives and delivered a letter announcing the suspension from membership of the four committeemen and demanding their re-

removal from the job, under the terms of the agreement. (R. III, 671-673, 846.) At that time there occurred a verbal clash in the presence of petitioner's representatives between the committeemen and the officers of the CIO. The spokesman for the committee charged the CIO with having failed to obtain wage increases for the employees. An officer of the CIO pointed out in reply to this charge that due to war-time restrictions it had been impossible to get such increases, and that the CIO reserved the right to discipline its members and to keep them working. (R. II, 527-528, 545.) At that time, the CIO officers advised petitioner's representatives that the committeemen could be suspended for many reasons and that they would have to stand trial before they could go back to work. (R. II, 538.) This incident ended at about 9:30 o'clock A.M. on July 31, 1945, with the dismissal of the four committeemen. (R. II, 528-529.)

7. / Later in the morning of July 31, 1945 the CIO distributed copies of a circular in the plant. (R. I, 257.) The circular stated, among other things, that "unscrupulous people who are attempting to promote strike action at this plant are traitors to our Union membership, our<sup>d</sup> flag and our country." (R. III, 789-790; R. I, 259.)

8. Beginning at approximately noon on July 31, 1945, a substantial-majority of petitioner's employees went on strike. The strike lasted until the morning of August 3, 1945. (R. I, 72-73; 257-258; R. II, 533.)

9. At the invitation of the strikers, one of petitioner's officers went to the meeting late in the afternoon of July 31, 1945. He urged the employees to go back to work (R. I, 257-258), and advised them that the men who had been suspended could not go back to work because of the provisions of the contract. (R. II, 529-530.)

10. On August 2, 1945, the strikers voted to dissolve the association and to affiliate with the A.F.L. (R. I, 259.)

11. On August 3, 1945, the employees, with the exception of the five stewards and the four committeemen, returned to work. (R. I, 258.)

12. News reports which appeared in the local press, and which came to the attention of petitioner, reported, among the causes of the strike, a dispute over the issue of racial discrimination. (R. II, 533; R. III, 776-778.)

13. During the period of the strike, petitioner secured the opinion of legal counsel as to the rights and liabilities of the parties under the collective bargaining agreement. Counsel advised that petitioner had to comply strictly with the terms of the closed shop provision and that petitioner could not pass upon the merits of the action taken by the CIO in suspending the employees. Petitioner acted thereafter in accordance with this advice. (R. III, 726-727.)

14. On August 3, 1945, the A.F.L. filed a petition for investigation and certification of representatives

with the Board, and by August 8, 1945, thirty-five of the employees involved had applied for membership in the A.F.L. The period following, up to and including October 15, 1945, was utilized by adherents of the CIO and of the A.F.L. in campaigning. Literature of both unions circulated inside as well as outside the plant. A.F.L. and CIO buttons were widely and openly worn. (R. I, 41.)

15. On August 14, 1945, the Board gave notice of hearing of the A.F.L.'s petition for certification and this notice was received by petitioner on August 17, 1945. (R. II, 549.)

16. On August 14, 1945, the first unfair labor charge preferred by the A.F.L. against petitioner was filed. The charge set forth that petitioner was engaging in unfair labor practices because it had terminated the employment of the five stewards and the four committeemen "because of their refusal to adhere to policies" of the CIO. (R. I, 92-93.)

17. On August 17, 1945, the nine suspended employees requested reinstatement. This request was denied by petitioner because of the advice it had received from its attorneys. (R. III, 727-728.)

18. On August 31, 1945, the CIO requested and obtained the discharge of six employees pursuant to the closed shop agreement. (R. III, 806-807; R. II, 654-656.)

19. On September 1, 1945, the CIO conducted a wholesale inspection of employees' union dues books at the plant. (R. III, 681-682; 709-713.)

20. On August 31, 1945, and prior to the dues checking incident above referred to, a minor official of the CIO came to petitioner's labor relations manager and requested the suspension of a long list of employees, and stated, in support of his request, that the persons involved were in bad standing, that some of them had not paid their dues and that others were not members of the CIO. Petitioner's representative refused to accede to this request and took up the matter with another official of the CIO. (R. III, 728-732.)

21. On the day following the dues book checking incident, that is, September 1, 1945, petitioner's representatives received a letter from the CIO requesting removal from the job of nineteen employees under the terms of the collective bargaining agreement and advising that the persons named therein were no longer in good standing. (R. III, 792-793; R. I, 315). Petitioner complied with this demand, but prior to doing so it requested information from the CIO as to the reason behind the suspension of these employees and the CIO's reply to this inquiry was that these persons had violated their oath, the constitution and the by-laws of the CIO. (R. III, 736.)

22. Shortly after September 1, 1945, four more employees were dismissed pursuant to demands made by the CIO under the terms of the closed shop contract. One was discharged on September 5th, two on September 7th, and the fourth on September 11, 1945. (R. I, 50 and Note 20; R. II, 806-807; R. II, 654-656.)

23. Subsequent to their discharge, the five stewards, the four committeemen and the other twenty-eight employees were tried before CIO rank and file tribunals. The transcript of the proceedings before the CIO tribunals and their decisions were received in evidence. (R. III, 877-922; 923; 987; 856; 866; 867-876; R. III, 771; 779.)

24. The four committeemen and the five stewards refused to stand trial and were tried *in absentia* on October 3, 1945. On October 10, 1945 they were found guilty and expelled. They had been charged with dereliction of duty, failure to enforce the policy against racial discrimination and participation in a strike during the war. (R. I, 52-53; R. III, 856-866; 877-922.)

25. On October 16, 1945, an election of bargaining representatives was held at the plant and pursuant to the decision and direction of election issued by the Board on September 26, 1945. (R. II, 549.) At this election the majority of votes was cast in favor of the CIO, notwithstanding the fact that most of the discharged employees voted. (R. II, 550-551.)

26. Sometime in November, 1945, the CIO informed petitioner of the action taken with respect to the four committeemen and the five stewards. (R. I, 154; R. III, 741-742; 762.)

27. On December 17, 1945, the remaining twenty-eight employees who were members of the CIO were tried by the CIO. (R. III, 923-987.) Some of them withdrew after having participated in the preliminary

portions of the trial. (R. III, 924; 930-935.) The ones who remained, eventually entered a plea of guilty and admitted that they had engaged in a prohibited strike. (R. III, 969-976.) On December 24, 1945 the trial committee issued its decision recommending the expulsion of the employees who failed to stand trial and that the employees who pleaded guilty be placed on probation. (R. III, 867-876.)

The proceedings had before the Board and the United States Court of Appeals for the Ninth Circuit subsequent to the occurrence of the above narrated events can be summarized as follows:

1. The Board issued its complaint on January 13, 1946 (R. I, 4-10) pursuant to charges preferred against petitioner by the A.F.L. (R. I, 1-4.) The complaint charged, in substance, that petitioner had interfered with the rights guaranteed the employees by Section 7 of the National Labor Relations Act (29 U.S.C.A. 157) and had committed unfair labor practices in violation of Section 8 of the same Act (29 U.S.C.A. 158), in discharging and threatening to discharge employees and refusing to reinstate them because of their membership in and activity on behalf of the A.F.L. and the Association and because of their failure or refusal to join or assist the CIO. The petitioner's answer denied certain allegations of the complaint and set forth the closed shop provision of the contract pursuant to which it acted. Its answer also set forth that some of the employees had been suspended and expelled by the CIO because of violations

of its constitution and its policy against wartime strikes. (R. I, 10-16.)

2. A hearing was had on the matter from February 4 to February 6, 1946, at San Francisco, California, before a Trial Examiner duly appointed by the Board. (R. I, 21.)

3. On March 27, 1946 the Trial Examiner issued his Intermediate Report and recommended therein that the complaint as a whole be dismissed. (R. I, 17-68.) The Trial Examiner found that under the facts it was impossible for petitioner to determine whether the CIO had suspended the discharged employees for such valid reasons as their resignation from the CIO, and their participation in the strike, or because of their activities on behalf of the A.F.L., and the Association. He also found, in this connection, that the petitioner could have ascertained the "true" motivation of the CIO only by intruding into the internal affairs of that Union, in violation of the National Labor Relations Act. (R. I, 61-65.)

4. On September 6, 1946, the Board issued its decision and order overruling the recommendation of the Trial Examiner (R. I, 68-83), and found that petitioner had discharged and refused to reinstate the employees in violation of Section 8(1) and (3) of the Act. (29 U.S.C.A. 158(1) and (3).) The order issued by the Board pursuant to said decision requires petitioner to offer immediate and full reinstatement to the discharged employees and to make them whole for any loss of pay suffered as a result of their discharge.

(R. I, 81-82.) The Board, in making its decision, applied the doctrine developed by it in *Matter of Rutland Court Owners*, 44 N.L.R.B. 587. The substance of the principle enunciated by the Board in that case is that an employer cannot properly discharge employees pursuant to the closed shop provisions of a contract when, to his knowledge, the discharge is requested by the contracting Union for the purpose of eliminating employees who have sought to change bargaining representatives at a period when it is appropriate for the employees to seek a redetermination of representatives. The Board presumed, inasmuch as petitioner had information indicating that the motive of the CIO *might* have been reprisal against the employees because of their advocacy of the A.F.L., that the petitioner had, in fact, knowledge of this alleged discriminatory motivation. (Analysis, Sept. 23, 1946, 18 L.R.R. 85, 86-87.) The Board also found in this connection that petitioner "made no bona fide effort to evaluate all the evidence before it" when it contended that it could not determine the CIO's "true" motivation. (R. I, 78-79.)

5. On December 30, 1946, petitioner filed its petition for review of the Board's decision and order in the United States Court of Appeals for the Ninth Circuit. (R. I, 101-126.) On February 3, 1947, the Board filed its answer to petitioner's petition, requesting the denial thereof and enforcement of the Board's order. (R. I, 134-144.)

6. On January 13, 1949, the Court of Appeals rendered its opinion and judgment affirming the decision

of the Board. (R. IV, 990-992.) The Court stated in its opinion that the "evidence abundantly supports" the following findings of ultimate facts made by the Board:

(a) That the CIO sought to use the closed shop contract for the purpose of punishing the insurgents; and

(b) That petitioner acceded to the discharge demands notwithstanding it knew that the Union had suspended the men in reprisal for their activities in favor of the rival Union. (R. IV, 992; 171 F. (2d) 956, 957.)

In affirming the Board's decision, the Court of Appeals approved for the second time the principle established by the Board in *Matter of Rutland Court Owners*, 44 N.L.R.B. 587, and stated that its approval of this principle in *Local No. 2880 v. N. L. R. B.*, 158 F. (2d) 365, controlled in the present case. (171 Fed. (2d) 956, 957.)

Petitioner, for the reasons hereinafter stated, seeks the reversal of the judgment of the Court of Appeals for the Ninth Circuit.

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#### **SPECIFICATIONS OF ERROR.**

The Circuit Court of Appeals erred:

1. In holding that Congress intended, in enacting the National Labor Relations Act of 1935, that discharges made pursuant to a valid closed shop contract should in themselves constitute unfair labor practice.

2. In holding that Congress intended, in enacting the National Labor Relations Act of 1935, that the Board should have the power to regulate employees and labor organizations.

3. In holding that Congress intended, in enacting the National Labor Relations Act of 1935, to prohibit the coercion of employees by employees or labor organizations.

4. In holding that Congress intended, in enacting the National Labor Relations Act of 1935, to empower the Board to protect recalcitrant Union members from their Union's discipline.

The order of the Court allowing certiorari states that the petition therefor "is granted, limited to the question of the construction of Section 8(3) of the National Labor Relations Act of 1935 in relation to this case." (R. IV, 999.) In compliance with the Court's order, we have abandoned Specifications of Error numbered 5, 6 and 7 set forth in our brief in support of the petition at pages 40 and 41 thereof.

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#### **SUMMARY OF ARGUMENT.**

The decision and order affirmed by the Court of Appeals is based on the premise that Congress intended, in enacting the National Labor Relations Act of 1935, to prohibit and make wrongful the coercion of employees by bona fide labor organizations. The truth of this premise is essential to the validity of the Board's decision, otherwise the Board's order depriv-

ing the CIO of its contract rights and petitioner of its property would be an arbitrary exercise of power. This premise is false. The express language of the Act and its congressional history furnish ample proof of its falsity. The decision of the Court of Appeals is, therefore, erroneous and in conflict with the applicable decisions of this Court.

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### ARGUMENT.

#### The Question Presented.

Under the terms of the order of this Court allowing certiorari, the question presented here is whether the construction given by the Board to the proviso to Section 8 (3) of the National Labor Relations Act of 1935 is valid.

The construction given by the Board to this Section of the Act is generally referred to as the *Rutland Court* doctrine.

The doctrine was evolved by the Board to overcome difficulties in the administration of the Act created by the competition between the American Federation of Labor and the Congress of Industrial Organization.

#### The Development of the Rutland Court Doctrine and the Argument in Support of its Validity.

The Act expressed two policies which seemed inconsistent. Section 7 guaranteed employees freedom in selecting, by majority vote, representatives for collective bargaining. The proviso to Section 8 (3), on the other

hand, allowed the making of closed shop contracts, thus substantially impairing the guarantee contained in Section 7. The construction given by the Board to the Act in this and other cases was an attempt to reconcile the seeming conflict between the two policies.

Section 7, prior to its amendment, provided as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choice and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C.A. 157.)

Section 8 (3) read as follows:

"It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *provided* that nothing in Sections 151-166 of this Title, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in Sections 151-161 of this Title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 159 (a) of this Title, in the appropriate collective bargaining unit covered by such agreement when made." (29 U.S.C.A. 158 (3).)

The Board first gave serious consideration to the problem apparently created by these two sections of the Act in 1939 in its decision in the *Matter of Ansley Radio Corporation*, 18 N.L.R.B. 1028. The employer in that case had entered into a closed shop contract with an AFL Union. While the contract was still in effect, a majority of the employees engaged in a campaign to replace the AFL Union with one affiliated with the CIO as bargaining representative. During the course of the campaign, two employees were discharged by the employer on his own initiative, because, as the Board found, of their activities on behalf of the CIO. (18 N.L.R.B., supra, 1042-1044.) Thereafter, as a result of the disruption occasioned by the warfare between the two Unions, the employer stopped production and laid off all of the production employees, including a group of fifteen who had resigned from the AFL and had become members of the CIO. (18 N.L.R.B., supra, 1046-1047.) When the effects of the dispute had been somewhat dissipated, production was resumed, but the employer in compliance with the closed shop contract, and the demands of the AFL thereunder, re-employed only those who remained members of the AFL or who had rejoined it in the interim. The fifteen employees who resigned from the AFL and joined the CIO, as well as the two who had been previously discharged, were refused employment. (18 N.L.R.B., supra, 1048-1051.) The employer was subsequently charged by the Board with the commission of unfair labor practices.

The Board's decision of the matter disclosed sharp disagreement among its members. Mr. J. Warren

Madden and Mr. Edwin S. Smith concurred in holding that the discharge of the two employees because of their advocacy of the CIO was discriminatory and constituted a violation of the Act. They ruled that a "closed shop" contract, so long as membership in the contracting union was maintained, did not require "abstention from talk and advocacy of change in affiliation as a condition of employment." (18 N.L.R.B., *supra*, 1042-1043.) Mr. William M. Leiserson, the third member of the Board, did not agree with this ruling, and in a very brief dissent said (18 N.L.R.B., *supra*, 1070):

"I am of the opinion that the entire proceedings should be dismissed".

Mr. Madden, with the tacit concurrence of Mr. Leiserson, held that because of the closed shop agreement, the employer had been justified in laying off and refusing to re-employ the fifteen employees who had resigned from the AFL, and had, therefore, in this respect committed no unfair labor practice. The reasoning employed by Mr. Madden is summarized in the following quotation from his opinion:

"The freedom guaranteed employees under the Act to form, join, and assist labor organizations and to bargain collectively through representatives of their own choosing, without economic or other compulsion by the employer, is qualified by the proviso clause of Section 8 (3). The legislative history of this clause as well as its language shows that its purpose was to leave undisturbed by the Act, except in two instances, a form of industrial relationship which had won increasing acceptance by employers and had found widening

approval in the law of the several States. The legislative intent and policy were to withhold what rights individual employees otherwise might have had under the Act but for the proviso in order to permit organized labor to seek and enter into this relationship where the employer was willing to do so and local law offered no obstacle.

Although the employees who withdrew from the Brotherhood were a majority of the employees in the unit and had designated another labor organization as their collective bargaining representative it cannot be said that by virtue thereof the immunity accorded the respondent by the proviso clause ceased under the Act and in consequence the respondent's refusal to reinstate was violative of the statute. If the Congress had intended to limit in this manner a relationship which it sanctioned under the Act and to impose a responsibility upon the employer for failure to recognize the limitation, certainly such limitation would have been express. There is no express limitation in the Act that the proviso is applicable only so long as the contracting union maintains its majority. The proviso clause declares that 'nothing in this Act' shall preclude an employer from 'making' a closed-shop agreement with a labor organization 'if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.' Although the proviso relates specifically only to the *making* of the agreement, the necessary implication is that the employer is protected against a charge of discrimination under Section 8 (3) in *carrying out* the closed-shop

agreement as made, at least where, as here, the agreement is for a reasonable period of time."

It should be noted that Mr. Madden would permit the employer to be protected by the proviso "at least where \* \* \* the agreement is for a reasonable period of time." This is important because it marks the beginning of the Board's policy with respect to "time appropriate for a redetermination of bargaining representatives" in unfair labor practice cases.

Mr. Smith did not agree with the views expressed by Mr. Madden on this aspect of the case. His dissenting opinion discloses that he placed the emphasis on the statutory right of the majority to freely choose bargaining representatives, and that he would not permit the employer to be protected by the proviso even when the agreement was for a reasonable period if the majority within that time determined upon a change of representatives. (18 N.L.R.B., *supra*, 1066-1070.)

We may fairly infer from Mr. Leiserson's brief and laconic opinion that he only concurred in the result achieved through Mr. Madden's opinion and that he would have afforded the protection of the proviso to the employer at any time while the closed-shop agreement was in force, regardless of the reasonableness of its duration. This inference, we believe, finds valid support in events hereinafter noted.

In 1942, some three years after the *Ansley* decision, the Board again had occasion to consider this problem in *Matter of Rutland Court Owners, Inc.*, 44 N.L.R.B. 587. By that time, the personnel of the Board had

changed. Of the group that had decided the *Analey* case, only Mr. Leiserson remained. Mr. Madden and Mr. Smith had left the Board and their places had been taken by Mr. Harry A. Millis and Mr. Gerard D. Reilly. Mr. Millis and Mr. Reilly decided in the *Rutland* case that the proviso to Section 8 (3) of the Act did not permit or require the employer to comply with the "closed-shop" provisions of a contract when, to his knowledge, discharges pursuant to the contract were sought and obtained by the contracting Union as a penalty for rival Union activities *carried on during a period when it was appropriate for the employees to seek redetermination of representatives*. In so holding, the Board determined the conduct of the employer had been illegal. On the basis of this determination, the Board deprived the Union of its contract rights and the employer of its property through an order requiring the employer to reinstate the discharged employees with back pay.

In this case the majority of the Board gave a liberal construction to Section 7 and a very narrow one to the proviso to Section 8 (3). The substance of the argument in support of the majority opinion was stated as follows:

"A contrary construction would in large part nullify the statutory scheme by which questions concerning the representation of employees are to be determined by the Board, using the machinery created for that very purpose under the Act. Since the contract here in question was about to expire, according to established Board policy the time was appropriate for a change of repre-

representatives, if the employees so desired. The Board, under such circumstances, would normally direct an election to resolve the question concerning representation and determine whom the employees currently desired as their exclusive representative. The discharge of the very employees whose representation is in issue, because they have placed their representation in question, is clearly inconsistent with the whole policy and general scheme of the Act.

The A. F. of L. Local, in its argument, recognizes that were its views to prevail the strike would be the only weapon remaining to the employees who wished to transfer their affiliation to the CIO Local immediately prior to the negotiation of a new contract. That the Act was designed to avert industrial strife, however, is clear beyond dispute. The Act contemplates that if self-organization is protected and collective bargaining by genuine employee representatives is encouraged, then collective bargaining contracts will result which will stabilize industrial relations and hence be conducive to industrial peace. The view advocated by the respondent and the A. F. of L. Local is inconsistent with this basic policy. To insist that employees can never transfer this affiliation from one union to another, or to prevent employees toward the close of one contract period from changing their representatives for the purpose of negotiating and administering a new contract for the succeeding term is to impair rather than protect self-organization, to thwart rather than encourage collective bargaining by representatives of the employees' genuine choice, and accordingly to produce contracts which will not tend

to stabilize mutually satisfactory labor relations or safeguard industrial peace. The stability intended by the Act is not that involved in a perennial suppression of the employees' will."

The foregoing discourse discloses the Board's laudable purpose but we do not find there or elsewhere in the opinion the answer to the most important question involved. The contract was made with a Union "not established, maintained or assisted by any action defined \* \* \* as an unfair labor practice" and, in addition, the discharges were requested and obtained while the contract was still in effect. It is clear, therefore, that the conditions precedent imposed by the Act to validate such contracts were fully complied with by the parties, and, what is more, no contention was ever made that the contract was invalid. Under such circumstances, the question immediately arises as to the Board's power to deprive a bona fide Union of its contract rights and to interfere in the conduct of its internal affairs, while administering a statute aimed solely at the unfair labor practices of employers. Or, to express it in another way, from whence is derived the power of the Board to terminate such contracts by a condition subsequent not specified in the Statute? The Board has never furnished an answer to this question.

Mr. Leiserson, who, as we have seen, would have given an employer the protection of the proviso to an employer at all times during the existence of a valid closed-shop contract with a bona fide union, dissented. His dissenting opinion is sufficiently brief and im-

portant to our position to be quoted in full. It is as follows:

"There is no contention in this proceeding that the closed-shop contract of 1939 is invalid. The discharges were made pursuant to the terms of that contract and are therefore within the terms of the proviso to Section 8 (3) of the Act. To reach a contrary result the majority has in effect assumed authority to suspend enforcement of the provisions of a valid collective bargaining agreement although this Board has previously held that it was not permitted to do so. If valid closed-shop contracts, which are expressly permitted by the Act, have undesirable effects, it is for the Congress, and not for the Board, to make the modifications. I would dismiss the complaint."

The exceptions implicit in the Board's announced policy or doctrine are exemplified in *Matter of Southwestern Portland Cement Co.*, 65 N.L.R.B. 1, and in *Matter of Diamond T. Motor Car Company*, 64 N.L.R.B. 1225. In the first case, the Board held that the contracting Union could request and obtain the discharge of an employee as punishment for activity on behalf of a rival organization when such activity took place at a time not appropriate for a redetermination of representatives. In making this determination, the Board ruled that the conduct of the Union was not wrongful and that the employer acted legally, even though he had knowledge of the Union's motivation in requesting the discharge. In the second case, the contracting Union sought and obtained the discharge of an employee in retaliation for his activity

on behalf of another organization at a time when it was appropriate to seek a redetermination of representatives, but the Board dismissed the complaint because it found that the employer had no knowledge of the Union's "wrongful" motivation. It will be noted that when the employer had no knowledge of the Union's motivation, the Union retained its contract rights, notwithstanding its alleged wrongful conduct.

The basic inconsistency of this approach to the problem led Board member Mr. James J. Reynolds, Jr. to express a vigorous dissent in *Matter of Lewis Meier & Company*, 73 N.L.R.B. 520. We quote a portion of his dissent as follows:

"My colleagues seek to remedy the discriminatory treatment of the employees here involved by compelling the respondent company to offer the said employees reinstatement and make them whole for loss of pay suffered as a result of the discrimination. The rationale for this decision is that the respondent's compliance with the closed-shop provision of its contract with the A. F. L. comprised an unfair labor practice because it was aware that the A. F. L. had deprived Baker, Hurst, and Kelly of their membership in the A. F. L. and had demanded their discharge because of their activity on behalf of the CIO. The inescapable impact of this reasoning is that had the respondent not been aware of this fact the Board would have dismissed the complaint, confessing impotence to offer the slightest impediment to such vicious violation of rights supposedly guaranteed employees under the Act. Thus, in the *Diamond T. Motor Car Company* case, an unaffiliated union holding a closed-shop

contract with the company expelled certain employees from its rank because of their efforts on behalf of another union affiliated with the American Federation of Labor, and requested successfully that the company discharge them in accordance with the terms of the collective bargaining contract. The Board, lacking what it in that case considered substantial evidence that the company knew of the discriminatory and illegal motive impelling the independent's expulsion of the employees from its organization, dismissed the complaint, concluding apparently that under such circumstances the free exercise of the employees' choice as to their representation is tantamount to a risk rather than a right."

An examination of the various cases in which the Board has applied the knowledge test discloses interesting variations. Where the employer has some information, not amounting to actual knowledge, that the discharges are requested as punishment for dual unionism, he commits an unfair labor practice if he complies with the request, without having first questioned Union members and officers as to the reasons underlying the discharge demand. (*Matter of Dura-steel Company*, 73 N.L.R.B. 941, 945.) The fact that such questioning would be interference and a gross violation of the Act does not daunt the Board. In this, and other cases where the employer has knowledge of several reasons, including dual unionism, which could cause the contracting union to demand the discharge, the employer must presume that the demand would not be made except for the employee's dual unionism,

and, if under the circumstances the employer fails to reject the demand, then the Board conclusively presumes that the employer knew that the discharge was solicited as a reprisal against the dual unionist. (*Matter of Colgate-Palmolive-Peet Company*, 70 N.L.R.B. 1202, 1208; *Matter of Durasteel Company*, supra, 73 N.L.R.B. 941, 943; "Analysis", 18 L.R.R. 85, 86-87.) It is evident that under these presumptions of knowledge any recalcitrant union member may place himself beyond the reach of the contracting Union's discipline merely by making manifest his hostility to it as bargaining agent.

In applying this policy, the Board has held that in cases involving a contract for a definite term, it is appropriate to seek a redetermination of representatives near the end of the contract term (*Matter of Kimberly-Clark Corp.*, 61 N.L.R.B. 90, 92-93) and in the case of contracts having automatic renewal clauses within a reasonable time prior to the automatic renewal date. (*Matter of Mill B. Inc.*, 40 N.L.R.B. 346, 351.)

The Board states that the policy thus evolved by it represents its considered judgment as to how the conflict between the general guarantee of Section 7, which permits employees to choose and change representatives, and the limitations imposed by the proviso to Section 8 (3), which permits discipline of employees in the interests of Union security and a stability of bargaining relationship, may most reasonably be reconciled so that the legitimate scope of each may be preserved without nullifying the other. (Brief for the Board before the Court of Appeals, 31.) There is, of

course, implicit in this statement the assumption that Congress intended such reconciliation of alleged conflicting policies despite the statute's complete silence on the subject of Union motivation, employer knowledge and time appropriate for a redetermination of representatives.

In considering the validity of the *Rutland Court* doctrine, it should be borne mind that the question is whether the Board has the power to suspend contracts which were valid at their inception and have remained valid, and that the question is not whether the Board has the power to declare invalid contracts which were void *ab initio*. The power of the Board to declare invalid contracts which were void *ab initio* has been sustained by this Court in *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248, 89 L.Ed. 216, and in other cases. We submit that the reasoning of these cases is not applicable to contracts which are not entered into for the express purpose of discriminating against some of the employees. (*Owens-Illinois Glass Co. v. N.L.R.B.*, 176 F. (2d) 172, 175-6.)

#### **The Rutland Court Doctrine in the Courts of Appeals.**

The Board's policy has found acceptance in the Courts of Appeals for the Second, Third and Ninth Circuits. It has been approved in the Second Circuit in the cases of *N.L.R.B. v. American White Cross Laboratory*, 160 F. (2d) 75, *Colonie Fibre Co. v. N.L.R.B.*, 163 F. (2d) 65, and *N.L.R.B. v. Geraldine Novelty Co.*, 173 F. (2d) 14; in the Third Circuit in the case of *N.L.R.B. v. Public Transport Service Co.*, 24 L.R.R.M. 2466 (Sept., 1949); in the Ninth Circuit

in *Local 2880, etc. v. N.L.R.B.*, 158 F. (2d) 365, and in this case, which was decided on the authority of *Local 2880, supra*. On the other hand, this policy or doctrine has been rejected by the Court of Appeals for the Seventh Circuit in the cases of *Aluminum Company of America v. N.L.R.B.*, 159 F. (2d) 523, and *Lewis Meier & Co. v. N.L.R.B.*, 21 L.R.R.M 2093, 13 Labor Cases, Par. 64163.

**Local 2880, etc. v. Board: The Rationale of the Rutland Court Doctrine.**

The Courts of Appeals for the Second and Third Circuits have not in any of the cases decided by them given or attempted an explanation of how it is possible for the Board, under a statute which has reference only to the unfair practice of employers, to deprive a bona fide Union of its contract rights. Such an explanation has been attempted by the Court of Appeals for the Ninth Circuit in *Local 2880, supra*.

This was an excellent case for the purpose, as none of the essential facts were in dispute and these, granting the validity of the doctrine, fulfilled every condition necessary to its application. There, the employer had entered into a closed shop contract with an AFL Union on May 3, 1940. This contract contained a clause providing for automatic renewal unless notice of modification or termination was given by either party prior to May 3rd of each succeeding year. The contract was automatically renewed on May 3, 1944, for an additional year. On April 1, 1944, a CIO Union filed a petition, under Section 9 (c) of the Act, which resulted in the Board ordering an election of repre-

sentatives. This election was held on June 23, 1944. The AFL, the contracting union, won the election. During the course of the election, Wilmarth, an employee, and member in good standing of the AFL, acted as an observer for the CIO. Thereafter, Wilmarth was tried by the AFL on charges of having assisted the rival organization and expelled on the basis of these charges. After his expulsion he was discharged at the request of the AFL. The employer knew at or about the time it discharged Wilmarth that he had been expelled from the AFL because of his activities on behalf of the CIO and that there was no other reason for his discharge (158 F. (2d) supra, 366-8). The employer was subsequently found by the Board to have violated Section 8 (3) of the Act, and on the strength of this finding he was ordered to reinstate Wilmarth with back pay. It was never contended either before the Board or the Court of Appeals that the closed shop contract was invalid, but the Court nevertheless sanctioned the Board's suspension or termination of this valid contract. The Court of Appeals in so doing expressed the rationale of the Rutland Court doctrine in the following proposition:

A labor organization which so coerces an employee as to cause him to exercise the rights guaranteed by Section 7 *in terrorem of discharge is ineligible* to become or remain a party to the closed shop contract, and a discharge by an employer pursuant to a contract vitiated by the ineligibility of the coercing Union is assistance of the type defined by the Act as an unfair labor practice (158 F. (2d) 368, 369).

The Court, as can be seen, considers the coercion exercised by the Union a condition subsequent which terminates or suspends the contract.

The Court in permitting the Board to declare a Union ineligible to become or remain a party to a contract, in effect, authorizes the regulation of Unions by the Board, and in permitting the Board to prohibit the performance of a closed shop contract, because it results in the coercion of employees by labor organizations, it in effect empowers the Board to prohibit Unions from coercing employees.

The reasoning of the Court of Appeals depends for its validity on the truth of the premise that a labor organization which coerces employees "is ineligible to become a party to a closed shop contract", and this premise itself must depend for its validity on the assumption that Congress intended to make illegal or "wrongful" the coercion of employees by other employees or labor organizations. The assumption that Congress intended to forbid the coercion of employees by labor organizations is an essential prerequisite, otherwise the Board's order affecting the Union's rights under the contract and depriving the petitioner of its property, would be entirely without support and would constitute an arbitrary exercise of power.<sup>2</sup>

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<sup>2</sup>"We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside."

*Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 233, 83 L.Ed. 126, 142.

"Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations."

*Consolidated Edison Co. v. N.L.R.B.*, supra, 305 U.S. 235, 83 L.Ed. 143.

### **The Board's Defense of the Rationale of the Rutland Court Doctrine.**

The excellent briefs filed by the AFL prior to decision did not set forth certain Congressional Reports which accompanied the adoption of the Wagner Act and which clearly showed that Congress, in enacting this statute, did not intend thereby to prevent the coercion of employees by labor organizations or to empower the Board to regulate the affairs of bona fide labor unions. After decision and on petition for rehearing, the AFL did forcefully call attention to one of these Reports, but the Court, although it wrote a short opinion on denial of the petition, failed to address itself to the arguments which the AFL based on this Report. (158 F. (2d) *supra*, 370.)

When this case was before the Court of Appeals we repeated with some elaboration the arguments which the AFL had made.

We stated in substance that the rationale of the doctrine could be sustained only on the assumption that the Wagner Act had been intended to make it an unfair labor practice on the part of the labor union to coerce employees. We pointed out that the Act was exclusively and expressly aimed at the unfair labor practices of employers, that it specifically sanctioned the closed shop and that the prohibition against union unfair practices could not be inferred or implied inasmuch as the Congressional reports clearly showed a contrary intent. We concluded, from these premises, that since a Union's conduct in soliciting a discharge under the terms of a closed shop contract had not been

made wrongful by Congress, that such request was lawful, and, further, that the employer's compliance therewith could not constitute an unfair labor practice under the Act.

In defense of the rationale laid down by the Court of Appeals and in answer to our argument, the Board said:

"The employer's argument is predicated upon the mistaken premise that because the Board was unable, prior to the amendments to the Act, to reach the contracting union's discriminatory conduct in requesting the discharge of rival union adherents under a closed-shop contract, the Board was equally powerless to reach the employer's discriminatory conduct in acceding to the contracting union's discharge demands notwithstanding the employer's knowledge of the union's discriminatory purpose. The contention fails to perceive and distinguish between the contracting union's *wrongful act* in requesting the discharge of rival union adherents, on the one hand, and the employer's own wrongful act in acceding to the discharge demands, on the other. The controlling factor is the employer's answerability for its own misconduct in discriminating against employees. The employer's responsibility is not minimized or extinguished because of lack of power to reach the contracting union's independent *wrongdoing*." (Italics ours.) (Brief for the Board before the Court of Appeals, 34-5.)

### **Wrongful Union Conduct: The Board's False Major Premise.**

In making the above quoted argument, the Board admits that it did not have the power to interfere in the government of bona fide labor unions, yet despite this admission it effectively regulated and frustrated the disciplinary measures adopted by them for their protection, through orders directed at employers. In this fashion, it also impaired the obligations of valid contracts as effectively as if it had been expressly empowered by the statute to do so. The Board when questioned as to its authority to interfere with organizations which Congress deliberately placed beyond its reach, blandly answers that it is not exercising its powers against them and is merely enforcing the Act's prohibitions against the illegal conduct of the employer. Since the alleged illegal conduct of the employer consists in performing a contract which is expressly permitted by the statute, one is quite naturally impelled to ask wherein lies the illegality of the employer's acts. To this the Board replies that it is "wrongful" for the contracting union to demand a discharge as penalty for the exercise of the rights guaranteed by Section 7, and that when the employer complies with such a "wrongful" demand, he in turn is guilty of wrongdoing. We reject as invalid the proposition that a contract is rendered unenforceable by the fact that one of the parties has knowledge that the other by means thereof intends to violate some law or public policy (53 A.L.R. 1364, 1366; *People v. Brophy*, 49 Cal. App. (2d) 15, 30-1, 120 Pac. (2d) 946, 954-5), but even if its validity were to be conceded, we

would, in the absence of express Congressional pronouncement, still be entitled to ask why such a demand by a union should be characterized as wrongful. In answer to this, the Court of Appeals and the Board would reply that such a demand is a "wrongful attempt to defeat the Congressional purpose to democratize the employees' organization by a free election of their bargaining agent." (*Local No. 2280, etc. v. N.L.R.B.*, supra, 158 Fed. (2d) 365, 370.) We gather from this that the Court of Appeals and the Board contend that union interference with the declared policy of the United States to protect the exercise by workers of full freedom of association, self-organization and designation of representatives set forth in Section 1 of the Act<sup>4</sup> and implemented by Sections 7 and 8 (29 U.S.C.A. 1, 7 and 8) is wrongful, and, therefore, subject to indirect restraint by the Board through orders issued against the employer. This contention is not novel. A similar one based on the declarations of policy set forth in the Norris-La Guardia Act<sup>5</sup> (29

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<sup>4</sup>"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection." (29 U.S.C.A. 151.)

<sup>5</sup>"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to

U.S.C.A. 102) and the Wisconsin Labor Code (St. Wis. 1933, Sec. 268.18)\* was put forth in *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 82 L. Ed. 872.

In that case the respondent argued that since the Federal and the Wisconsin statutes declared that employees should have full freedom of association, self-organization, and designation of representatives, it was wrongful for the union to coerce it to require its employees to join the union.

The Court of Appeals for the Seventh Circuit was persuaded by the contentions of the respondent, and having in mind the expressed public policy, gave it precedence and held that inasmuch as the union activity involved interfered with the individual working man's freedom of association, self-organization and designation of representatives of his own choosing, such activity was unlawful and should be enjoined. In so holding, the Court of Appeals said:

“ \* \* \* The controversy, rather, seems to be a unilateral one with the sole object of coercing appellee to compel its employees to join the appellant union, in order that it may represent the em-

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decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or any self-organization or any other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.” (29 U.S.C.A. 102.)

“The State policy was substantially the same as the national policy expressed in the Norris-La Guardia Act.”

employees in their dealings with the employer. Appellants seek to accomplish that result by picketing and damaging the employer's business. But, under the Norris-LaGuardia Act and the Wisconsin Labor Code, it would amount to a violation of both the federal and state law if appellee complied with appellants' demands, for under those laws the employer is specifically enjoined from influencing his employees in their choice of a union or their representative. The employees have refused to join the appellant union, they have organized their own union and have selected their own representative without interference or participation of their employer, and their rights in these respects are as fully protected by the laws as are those of appellants.

The declared public policy of both the nation and State of Wisconsin establishes the substantive rights of appellee's employees which the courts will protect by injunction, though no specific provision therefor be contained in either Act. *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U.S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; *Trustees of Wisconsin State Fed. of Labor v. Simplex Shoe Mfg. Co.*, 215 Wis. 623, 256 N.W. 56. It being unlawful for appellee to dictate to its employees what organization they should join, or what representative they should select, and likewise unlawful to refuse to recognize the agency which they had selected, and recognize another representative which they had rejected, it follows that appellants' demand upon appellee was unlawful."

*Lauf v. E. G. Shinner & Co.*, 82 Fed. (2d) 68,

The Court of Appeals, like the Board, sought to protect the rights of the individual workers from union interference, although the statutes involved did not contain any provision authorizing such action. The Board is in no better position because the National Labor Relations Act gives it no power to restrain the coercive activities of unions. As can be seen, the Court of Appeals and the Board have both attempted to infer such authority from the statements of policy contained in the statutes.

This Court, when the case came before it, held that these declarations of policy could not limit the definition of non-enjoinable "labor dispute" set forth in the Norris-La Guardia Act, and that, therefore, the issuance of an injunction was not authorized. This Court said:

"The Court of Appeals erred in holding that the declarations of policy in the Norris-La Guardia Act and the Wisconsin Labor Code to the effect that employees are to have full freedom of association, self-organization, and designation of representative of their own choosing, free from interference, restraint or coercion of their employers, puts this case outside the scope of both acts since respondent cannot accede to the petitioners' demands upon it without disregarding the policy declared by the statutes. This view was expressed in the court's first opinion on the appeal from the issue of an interlocutory injunction, and the opinion on the appeal from the final order adopts what was said on the earlier appeal as the law of the case. We find nothing in the declarations of policy which narrows the definition of a

labor dispute as found in the statutes. The rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined."

*Lauf v. E. G. Shinner & Co.*, 303 U.S. 330, 82 L. Ed. 877, 878.

For the purposes of this litigation, it should be noted that under the Norris-La Guardia Act, a case was held to involve or grow out of a labor dispute when "the case involves any conflicting or competing interests in a 'labor dispute' \* \* \* of 'persons participating or interested' therein \* \* \*" (29 U.S.C.A. 113(a)), and that the term "labor dispute" was said to include "any controversy concerning terms or conditions of employment, or concerning association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee". (29 U.S.C.A. 113(c).) It seems to us too clear for argument that the controversy between the competing unions in this case falls squarely within the definition of a non-enjoinable labor dispute set forth in the Norris-La Guardia Act. It is, therefore, submitted that the board has indirectly done in this and other cases what the District Courts of the United States were forbidden to do under the terms of the Norris-La Guardia Act. That interference by the board in such a labor dispute is entirely unauthorized and impossible to justify by

the mere application of the epithet "wrongful" to the conduct of the contracting union is patent on the authority of *United States v. Hutcheson*, 312 U.S. 219, 85 L.Ed. 788, where this Court said:

"The Norris-La Guardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. *In this light Section 20 removes all such allowable conduct from the taint of being a 'violation of any law of the United States', including the Sherman Law.*" (Italics ours.)

*United States v. Hutcheson*, 312 U.S. 236, 85 L.Ed. 795.

On the basis of the foregoing we submit that, even though it were true that the National Labor Relations Act had no history or background to guide us with respect to the Congressional intent, there can be no justification for inferring from its terms the illegality of conduct which the Norris-La Guardia Act expressly made lawful. Mr. Justice Butler, dissenting, in *Lauf v. E. G. Skinner & Co.*, supra, characterized the object sought to be achieved by the union as "morally indefensible" (303 U.S. 333, 82 L.Ed. 878), and the Board no doubt views the conduct of the CIO in this case in the same light, and one must concede that these opinions are shared by many, but even this would not authorize the inference of wrongful union conduct which the board seeks to draw from the Act, and the reason for this appears to us to be obvious. The question of the legality or wrongfulness or morality or immorality of the competitive tech-

niques employed by labor and capital, including the "yellow dog" contract, and its counterpart, the closed shop contract, have been the subject of perhaps a century of controversy and of countless conflicting judicial decisions, but nevertheless there still exists a division of opinion on these matters. That this should be so is not surprising as these are matters involving many and conflicting views on economic problems and neither the contending groups nor the Courts could be expected to agree on a common economic theory. The resolution of these conflicts and the choice of a prevailing economic doctrine appear, therefore, to be political matters, to be determined by the Legislature within the limits set by the Constitution. It is for this reason that this Court has held that these are matters to be determined by the clear pronouncements of the State Legislatures or Congress and that they should not be made to depend on the varying economic preferences of the Courts. (See concurring opinion of Mr. Justice Frankfurter in *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538, 543-57, 93 L.Ed. Ad. Ops. 209, 241-19.) It appears to us obvious that the Board has in this case determined the issues in accordance with its economic views, and has, therefore, failed to exercise the self-discipline necessary to the proper performance of its quasi-judicial function.

We have mentioned above the Congressional Reports which accompanied the adoption of the Wagner Act and we have likewise made passing reference to its history. We will show hereinafter that even if

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 it were proper to draw the inference that Congress intended to make wrongful the coercive use by unions of the closed shop contract when it enacted this statute, that such inference cannot be sustained in the face of the mass of direct evidence furnished by these Reports and other sources establishing a contrary intent.

The Congressional history of the closed shop proviso to Section 8(3) of the Act is detailed in *Algoma P. & V. Co. v. Wis. Emp. Rel. Bd.*, 336 U. S. 301, 306-11, 93 L. Ed. Ad. Ops. 541, 546-8, and for this reason it appears unnecessary to recount it in this brief. It is important to note, however, that there is nothing in this history which gives the slightest support to the contention that Congress intended to authorize the Board to suspend or terminate valid closed shop contracts when and if the contracting union interfered with the employees' right to choose representatives. At this point it is also desirable to state that this Court's division of opinion in the *Algoma* case, supra, on the question of whether the Wagner Act authorized the closed shop or merely evidenced a Congressional disclaimer not to interfere with it where it was permitted by state law is of no moment in this case, as such contracts were and are legal and enforceable in California. (*Levy v. Superior Court*, 15 Cal. (2d) 692, 104 Pac. (2d) 770; *Montalbo v. Hires Bottling Co.*, 59 Cal. App. (2d) 642, 139 Pac. (2d) 666; Cal. Labor Code, Section 1126.) It also seems appropriate while on the subject of California law to show that in California judicial decision has legalized that most

coercive features of the closed shop contract. The Supreme Court of California accepted the principles of *Allen v. Flood*, App. Cas. (1898) H. of L. 1, in 1908, some ten years after that case was decided by the House of Lords (*Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 595, 98 Pac. 1027, 1032-3, 21 L.R.A. (N.S.) 550, 558). *Allen v. Flood*, supra, as is well known, stands for the proposition that it is legal for a labor organization to seek to obtain a monopoly, and that for this purpose it may properly coerce the employees who do not join with it or oppose it. Attempts have been made to infringe upon this proposition by contending that the public policy of California, expressed in Sections 921 and 923 of the California Labor Code, prohibits interference by unions with the working man's rights to join or not to join a labor organization, and these contentions have been invariably rejected by the California Courts. (*Park & T. I. Corp. v. Int. etc. of Teamsters*, 27 Cal. (2d) 599, 609-12, 165 Pac. (2d) 891, 897-9, 162 A. L. R. 1426, 1433-5.) The California Courts have departed from the principles of *Allen v. Flood*, supra, only in cases where the closed shop is coupled with an arbitrarily closed union. (*Williams v. International Brotherhood of Boiler Makers*, 27 Cal. (2d) 586, 591-2, 165 Pac. (2d) 903, 905-6.) But they have in so doing also adopted the Restatement's view that it is not unreasonable for a union not to retain as a member one who engaged in activities antagonistic to it or is a member of a rival organization. (*James v. Marins-ship Corp.*, 25 Cal. (2d) 721, 736, 155 Pac. (2d) 329,

338; *Davis v. International Alliance, etc. Employees*, 60 Cal. App. (2d) 713, 714-15, 141 Pac. (2d) 486, 488, Rest. Torts, Comment b to Section 810.)

The foregoing resume demonstrates that the California law is in conflict with the Rutland Court doctrine. No doubt the Board could argue now as it has done in the past that the local law must yield to the Board's version of the Federal law where the two cannot stand together. (Brief for the Board before the Court of Appeals, 65.) This argument, however, has been rendered invalid by this Court's assertion in the *Algoma* case, *supra*, that the Wagner Act did not change the status of closed shop agreements in the States where these were lawful. (336 U.S. 310, 93 L.Ed. Ad. Ops. 546-7.)

The Congressional Reports and other historical sources furnish ample evidence of the fact that Congress was fully aware that in California and other jurisdictions unions were permitted to coerce employees by means of the closed shop contract when it determined in enacting the Wagner Act not to interfere with this relationship. These sources also furnish evidence that Congress knew full well that unions could by the coercive use of these contracts perpetuate themselves in power and that notwithstanding this knowledge, it determined not to limit the duration of these agreements or to prevent their coercive use.

As the starting point for our proof of the matters above mentioned, we will take Section 7(a) of

the National Industrial Recovery Act (15 U.S.C.A. 707(a)), which may well be termed the predecessor of the Wagner Act. Friends of labor feared because of statements made by public officials in charge of the administration of the Recovery Act that this Section would be interpreted so as to deprive labor of the right to use the closed shop as a competitive weapon and that the Courts would, on the basis of the policy expressed by these officials, refuse to enforce closed shop agreements and abandon the *laissez faire* policy in disputes between rival unions. ("Labor Injunctions Since the N.R.A.", 43 Yale L. Jour. 625, 632-633.)

To allay these fears and to make it clear that unions were not to be put in a worse position than they were before the Recovery Act was passed, Senator Wagner offered new labor legislation in the Senate under the name "Labor Disputes Act" on March 1, 1934. In proposing this new legislation, he said:

"The new legislation which I am proposing does not dictate any policy as to the closed union shop. That is a problem which labor must work out for itself. But the Bill does make it clear that Section 7(a) was not intended to place employees in a worse position than they were before the Recovery Act was passed." (78 Cong. Rec. 3443.)

It is interesting to note that Senator Wagner had considered the advisability of limiting the duration of closed shop contracts to provide, as has the Board, for a "time appropriate for a redetermination of

representatives". Section 5(6) of the Labor Disputes Act had a proviso which read as follows:

"\* \* \* *Provided, further, that nothing in this Act shall preclude an employer and a labor organization from agreeing that a person seeking employment shall be required, as a condition of employment, to join such labor organization, if no attempt is made to influence such labor organization by any unfair labor practice, if such labor organization is composed of at least a majority of such employer's employees, and if the said agreement does not cover a period in excess of one year.*" (Italics ours.) 78 Cong. Rec. 3443.

It is notable that the Board by an administrative ruling, incorporated into the National Labor Relations Act of 1935 the limitation proposed by Senator Wagner. (*Matter of Detroit & Cleveland Navigation Co.*, 29 N.L.R.B. 176, 179-180.) However, the obviously reasonable and sensible limitation suggested by Senator Wagner was omitted in the Senate Committee's revision of the proposed legislation. We note, therefore, from the foregoing that by the time the hearings before the Committee on Labor were held during the first quarter of 1935 on the proposed Wagner Act that those concerned with the legislation knew of the abuses which could occur in the event no provision was made in the Act either to prevent the coercion of employees by labor organizations or to provide for a period appropriate for a redetermination of bargaining representatives. With all of this clearly in mind, both Senator Wagner and Mr. Harry A. Millis, later Chairman of the National Labor Rela-

tions Board, testified in opposition to any legislation which would forbid coercion by others than employees. On this subject, Senator Wagner stated the following:

*"It has been claimed that in order to be fair, the bill should prohibit employees and labor organizations, as well as employers, from coercing employees in their choice of representatives. This argument rests upon a misconception of the needs which give rise to this measure. Violence and intimidation by either employers or workers are adequately prevented by the common law and do not require special treatment. This measure deals with the subtler forms of economic pressure. Such pressure cannot be exerted by employees upon one another to an extent justifying congressional action. But it can be directed against a worker by an employer who controls his job. It is this latter evil which has grown to a magnitude requiring a new public remedy. Furthermore, many courts have defined the term 'coercion' to embrace all strikes or picketing, no matter how justifiable. They have drawn a line between legal and illegal coercion. Thus to prohibit employees from coercing their own side would not merely outlaw the undesirable action which the word connotes to us, but would make the result reached in the loudly condemned Hitchman Coal Case, 245 U. S. 229 (1917), the law of the land. It would defeat the very freedom of self-organization which the bill is designated to protect. All legislation strives not for an abstract or proper equality but for conditions which will produce actual equality in the light of concrete facts."* (Italics ours.) (Hearings before

the Senate Committee on Education and Labor,  
March 11, 1935, page 47.)

The testimony of Mr. Millis was in substantial agreement with that of Senator Wagner. He said:

"As a matter of logic, the bill should prohibit labor organizations from coercing employers in the self-organization of employer associations, as they have sometimes done in cooperation with these associations. That is unnecessary, however, for it is unlawful. *Coercion of labor by labor alone needs discussion.*

Employers and their agents, and organized workers coerce and interfere in rather different ways. Enthusiastic union members and union agents may coerce workers in four ways: First, by physical violence; second, by threats of violence; third, by use of approbrious names; *fourth by unionization through pressure of the closed union shop.* There is abundant State and municipal law against actual and threatened violence and against the use of epithets and approbrious names. *Frequently, the closed union shop, especially if it would involve discharge of employees for nonmembership in a union, is under the ban of state law. It is evident that it is the thought of the drafters of this bill not to interfere with state law upon the subject.* This, I think, is desirable. The closed union shop is likely to cease to be an issue and practically to disappear when active employer opposition to organization and collective bargaining and discrimination against union men cease. That is the conclusion to be properly drawn from British and other foreign experience." (Italics ours.) (Hear-

ings before Senate Committee on Education and Labor, March 18, 1935, p. 179.)

It will be noted that both Senator Wagner and Mr. Millis recommended that questions involving the coercive use of the closed shop should be left for determination to the State Courts and that the Federal Government should not interfere in this matter.

The Senate Report which accompanied the adoption of the National Labor Relations Act, stated clearly, in language which closely paralleled that used by Senator Wagner and Mr. Millis, that in adopting this legislation there was no intent on the part of Congress to forbid the coercion of employees by labor organizations. We refer the Court in this connection to the following taken from this Report:

"There is an even more important reason why there should be no insertion in the bill of any provision against coercion of employees by employees or labor organizations. Courts have held a great variety of activities to constitute 'coercion': A threat to strike; a refusal to work on material of nonunion manufacture; circularization of banners and publications; picketing; even peaceful persuasion. In some courts, closed shop agreements or strikes for such agreements are condemned as 'coercive.' Thus, to prohibit employees from 'coercing' their own side would not merely outlaw the undesirable activities which the word connotes to the layman, but would raise in Federal law the ghosts of many much-criticised injunctions issued by the courts of equity against activities of labor organizations, ghosts

*which it was supposed Congress had laid low in the Norris-LaGuardia Act.*

Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police-court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. The Norris-LaGuardia Act does not deny to employers relief in the Federal courts against fraud, violence, or threats of violence. (See 29 U.S.C. sec. 104 (3) and (i).)

Racketeering under the guise of labor-union activity has been successfully enjoined under the antitrust laws when it affected interstate commerce. The latest case along these lines is *United States v. Local No. 167 et al.* (291 U.S. 293.)

In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of such fraud and violence. Deliberations and hearings by the Board, followed by orders that must be referred to the Federal courts for enforcement, are methods of procedure that could never be sufficiently expeditious to be effective in this connection.

The only results of introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with countercharges and recriminations that would prevent it from doing the task that needs to be done. There is hardly a labor controversy in which during the heat of excite-

ment statements are not made on both sides which, in the hands of hostile or unsympathetic courts, might be construed to come under the common law definition of fraud, which in some States extends even to misstatements innocently made, but without reasonable investigation. And if the Board should decide to dismiss such charges, its order of dismissal would be subject to review in the Federal courts.

Proposals such as these under discussion are not new. They were suggested when section 7(a) of the National Industrial Recovery Act was up for discussion, and when the 1934 amendments to the Railroad Labor Act were before the Congress. In neither instance did they command the support of Congress." (Italics ours.) (See Senate Reports, Vol. 9877, 74th Cong. 1st Sess., R. 573, to accompany S. 958, May 2, 1935, at page 16.)

The above quoted Senate Report was incorporated in the Report of the House Committee on Labor, (Rep. No. 1147 of House Committee on Labor, June 10, 1935, 74th Cong. 1st Sess., pages 15 to 17.)

In view of the positive and unambiguous declaration of Congressional intent contained in the above quoted material, it seems to us that there can be no doubt that the "Congressional purpose to democratize the employees' organization by a free election of their bargaining agent", was to be achieved through elections free from employer interference, not elections free from Union coercion. This one-sided approach to the problem was the basic and the much

criticized defect of the Wagner Act. (Teller, "Labor Disputes in Collective Bargaining", Vol. Two, 695; Magruder, "A One-Half Century of Legal Influence upon the Development of Collective Bargaining", 50 Harv. L. Rev. 1071, 1108-10.)

The problems and abuses which were to result from this defect were not then entirely foreseeable. It is common knowledge that when the Act was drafted and adopted that the schism in the labor movement which culminated in open warfare between the AFL and CIO, had not occurred, and was not anticipated. Therefore, Congress had no reason to provide in the Wagner Act a remedy for evils which might arise as a result of the then not foreseen breach in the ranks of labor. At the time this legislation was enacted, it was thought that the contest would be between organized labor, on the one side, and employers, non-union employees and company dominated "employee representation plans" masquerading in the guise of so-called "independent unions", on the other. (Gregory, "Labor and the Law", 246 (W. W. Norton & Company, New York, 1946).) Therefore, employees were, under this Act, not to be free to remain unorganized or free from concerted union activities to organize them. The freedom or democratization intended was only freedom from employer autocracy. Those who drafted the Wagner Act knew as the above quoted report discloses, that employers had been only too anxious to outlaw the "closed shop" contract as coercive and too prone to attempt to defeat the organization of their employees by pretending to be

the protagonists of the non-union men's right to remain unorganized. It may have been inadvertence on the part of Congress not to foresee that a rival as strong as the CIO would compete with the AFL, but certainly there was no inadvertence in not prohibiting or in not making wrongful the coercion of employees by labor organizations. (Gregory, *op. cit.*, 317.)

The *Rutland Court* doctrine, we must conclude in view of the evidence, was a device invented by the Board with the laudable purpose of mitigating the abuses which resulted from the competition between the AFL and the CIO, but the Board's good intentions should not blind us to the fact that this was legislation by administrative fiat and entirely contrary to the intent and purpose of Congress. For the Board to declare a union ineligible to become or remain party to the closed shop contract and to deprive it of its contract is, in effect, *regulation* by the Board of labor organizations, and such regulation of labor organizations, the Senate Report tells us, is not "germane to the purpose of" the National Labor Relations Act. To prohibit the performance of a "closed shop" contract because it results in the coercion of employees by labor organizations is, in effect, "to prohibit" employees and unions "from coercing their own side" and this prohibition, it is clear, was not intended by Congress. Congress having expressly and emphatically declared that it did not intend to regulate unions, and having expressly defined and denounced in the Act itself only the unfair labor practices of employers, there is, we submit, no reason for inferring such

a regulation or such a prohibition as the Court of Appeals has done in the case of *Local No. 2880, etc. v. N.L.R.B.*, supra. Further evidence of Congressional intent not to prohibit the coercion of employees by labor organizations is to be found in the fact that Congress in enacting "The Labor Management Relations Act, 1947" did specifically prohibit such coercion.

The Wagner Act generally, and Section 8 thereof in particular, have been radically amended by the Labor Management Relations Act, 1947. The changes wrought in the pertinent sections of the Wagner Act by these amendments cannot be validly described as "clarifications". Such amendments give rise to a presumption of change, not clarification. (Sutherland, "Statutory Construction" (3rd Ed.), Sec. 1930, 412-16.)

The Board's position is that under the Wagner Act it had power to regulate labor unions by declaring them ineligible to be parties to a "closed shop" contract when the unions committed the unfair labor practice of coercing their members in the exercise of the rights guaranteed by Section 7 of said Act. The Board maintains that the Act so provided, and it follows that it would be unreasonable and unnecessary to "change" the Act for the purpose of inserting a provision which already existed therein. Section 8 (b) (1) and (2) of the new Act provides in part as follows:

"(b) It shall be an *unfair labor practice* for a labor organization or its agents—

(1) *to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: \* \* \**

(2) *to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; \* \* \**

29 U.S.C.A. 158 (b)(1)(2).

Here we have for the first time in express language a statutory prohibition against the coercion of employees by other employees or labor organizations. Was it necessary to make a "change" to express what already was law?

The Conference Report of the House accompanying the adoption of the Labor Management Relations Act, 1947, furnishes ample proof of the fact that change, not clarification, was the desired objective. We find that the Act was to be "two-sided", no longer "one-sided".

"In amending section 1 of the National Labor Relations Act (the policy thereof) the House bill omitted from the present law all of the so-called findings of fact, some of which have been so severely criticized as being inaccurate and *entirely one-sided*. The Senate amendment rewrote the findings and policies contained in section 1 of the National Labor Relations Act so that those findings will not hereafter constitute an indict-

ment of all employers. At the same time the Senate amendment inserted in the findings of fact a paragraph to the effect that experience has demonstrated that certain practices by some labor organizations have the effect of burdening commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce. The Senate amendment further declared the elimination of such practices to be a necessary condition to the assurance of the rights herein guaranteed. Thus under the Senate amendment the findings and policies of the amended National Labor Relations Act are to be '*two-sided*.' The conference agreement adopts the provisions of the Senate amendment in this respect." (Italics ours.)

H.R. Report No. 510, 80th Congress 1st Session, 30-1.

We also find that Congress knew that under the old Act an employee was not free from being coerced into a union, and the new Act changes the situation so that now he is free to remain unorganized.

"The *second change* made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so."

H.R. Report No. 510, 80th Congress 1st Session, 39-40.

The report shows that in defining in the new Act, the unfair labor practices of unions, Congress was "adding" to the Act. We submit that there is no necessity for adding anything to a statute if it is already there.

"Both the House bill and the Senate amendment amended section 8 of the National Labor Relations Act by *adding thereto unfair labor practices on the part of labor organizations.*" (Italics ours.)

H.R. Report No. 510, 80th Congress 1st Session, 40.

The present and past history of the Act outlined above makes it clear that no inference of wrongful union conduct can be drawn from the provisions of the original version. This establishes that the major premise of the Board's argument is false.

It is also clear that since such conduct was not culpable that there was no cause or reason for declaring the ineligibility of a union as a party to a "closed shop" contract and to deprive it of its contractual rights. This being so, it follows that the second or minor premise of the Board's argument is also false.

It is likewise patent, that if there has been no vitiating conduct that when a discharge is made by an employer pursuant to a "closed shop" contract, a labor organization is *not*, as the Board and the Court of Appeals conclude, "assisted by \* \* \* action defined in Section 8(1) as an unfair labor practice" in viola-

tion of the express language of the proviso" to Section 8(3).

Moreover, if there has been no assistance given to the union by the employer through any unfair labor practice, the contract is valid under the proviso and both the union and employer may insist on its performance.

We submit that the foregoing establishes that the rationale of *Local 2880, etc., v. N.L.R.B.*, supra, the basis of the decision in this case, is invalid. These decisions are attempts to remedy demonstrated defects in existing legislation by judicial fiat. This Court has consistently held that the removal of such defects is within the exclusive province of the legislature and that Courts and administrative tribunals exceed their powers when they attempt it. It is, therefore, submitted that the decision of the Court of Appeals approving the Board's construction of Section 8(3) of the Act is in conflict with the following applicable decisions of this Court:

*Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 88 L.Ed. 1488;

*Iselin v. U. S.*, 270 U.S. 245, 70 L.Ed. 566;

*Manhattan G. E. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 80 L.Ed. 528;

*Koshland v. Helvering*, 298 U.S. 441, 80 L.Ed. 1269;

*Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 83 L.Ed. 1071;

*Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 84 L. Ed. 656;

*Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 86 L. Ed. 1307;

*Helvering v. Sabine Transp. Co.*, 318 U.S. 306, 87 L. Ed. 773.

We feel certain that the Board will, despite the fact that all arguments in favor of its contentions have been overcome, attempt to support its position on this Court's decision in *Wallace Corporation v. N.L.R.B.*, supra, and in anticipation of this possibility we respectfully urge that this Court refrain from extending the rationale of that case beyond the factual situation which this Court had before it. Valid reasons for so restricting the application of the ruling in the *Wallace* case are given by the Court of Appeals for the Seventh Circuit in the recent case of *Owens-Illinois Glass Co. v. N.L.R.B.*, supra, where the following is stated:

"While the decision in the *Wallace* case has been dissected by the parties in their briefs almost line by line, we see no reason to do likewise. Notwithstanding that the rationale of the *Wallace* case places a heavy, if not unfair, burden upon an employer charged with the duty of bargaining in good faith with a properly certified bargaining agent relative to a union-shop agreement, the holding must be accepted. At the same time, according to our view, its rationale should not be extended beyond the precise situa-

tion which the court had before it, and this particularly in view of the emphatic dissenting opinion joined in by four justices of the court.

It is true, as emphasized by the company here, that the court in the Wallace case had before it an extreme situation, wherein it appears that the company and the union deliberately entered into a contract for the express purpose of enabling both the company and the union to accomplish what they both desired, that is, to get rid of certain employees who were members of a rival union. In fact, the union with whom it contracted was a company-dominated union. As the court stated, 323 U.S., at page 256, 65 S. Ct. at page 242, 89 L.Ed. 216: 'It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. To permit it to do so by indirection, through the medium of a "union" of its own creation, would be to sanction a readily-contrived mechanism for evasion of the Act.'

While the facts in the Wallace case are a far cry from those of the instant case, yet we think the Wallace case stands for the proposition that a contract entered into between a company and a union, with knowledge on the part of the former that it is to be used by the latter as a means of doing away with members of a rival union, is invalid."

The analysis of the *Wallace* case made by the Court of Appeals for the Seventh Circuit discloses that the

basic problem which confronted this Court was that of a closed shop contract, coupled with an arbitrarily closed Union, a problem not unlike the one resolved by this Court in *Steele v. Louisville & Nashville R. R. Co.*, 332 U. S. 192, 89 L. Ed. 173. This problem is not encountered in the instant case. The record makes it clear that this is not a case where the employer has entered into a contract with knowledge of a Union's intent to deal unfairly with employees who are unreasonably denied membership. To the contrary, it must be assumed in this case, on the basis of the record, that the contract was entered into by the Petitioner with every expectation that the CIO would not use it to deal unfairly with any of its members.

This being a case involving merely a situation where an employer has in good faith performed a valid contract which complies with all the conditions precedent expressly required by the statute, it appears to us not unreasonable to ask this Court to hold that the Board has acted in excess of its powers. The penalty imposed upon petitioner is fundamentally unfair. It is not reasonable to expect, in the absence of express and specific statutory command, that Petitioner's representatives should have become aware of the expert subtleties and refinements implicit in the *Rutland Court* doctrine and its application to varied factual situations.

We submit, therefore, that the order of the Board in this case is not remedial but punitive and arbitrary, and that for this reason the judgment of the

Court of Appeals for the Ninth Circuit affirming it should be reversed.

Dated, San Francisco, California,  
October 21, 1949.

Respectfully submitted,

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BARTLEY C. CRUM,

*Attorneys for Petitioner.*

R. J. HECHT,

*Of Counsel.*

(Appendix Follows.)

## Appendix

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### Section 151. *Findings and declaration of policy.*

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Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, Section 1, 49 Stat. 449.

### Section 152. *Definitions.*

When used in sections 151-166 of this title—

\* \* \* \* \*

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

Section 157. *Right of employees as to organization, collective bargaining, etc.*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. July 5, 1935, c. 372, Section 7, 49 Stat. 452.

Section 158. *Unfair labor practices by employer defined.*

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any

labor organization: *Provided*, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under sections 151-166 of this title.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title. July 5, 1935, c. 372, Section 8, 49 Stat. 452.